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CHANCERY COURT JUDGES

Renowned Chancery Court chief judge announces 'retirement'

Chancellor William Chandler III, one of the world's most influential business court judges, made a surprise announcement April 25 that he will step down as chief judge of the vaunted Delaware Chancery Court as of June 17.

Chandler, who has headed the five-member court since 1997 and presided over some of the most high-profile corporate disputes in the past two decades, said he is retiring from the bench to pursue other ventures.

"I want to pursue new and exciting opportunities and challenges that are available to me," Chandler said in an April 25 statement. "I also believe now is the time for me to seek greater financial rewards in the interest of my family."

Some of those larger rewards could come from advising the nation's largest corporations and law firms on mergers, acquisitions and corporate governance matters.

Top-tier law firms and corporations would consider Chandler a prized addition.



Chancellor William Chandler III said he is retiring partly "to seek greater financial rewards in the interest of my family."

CONTINUED ON PAGE 8

COMMENTARY

'Material adverse change' clauses protect against loss of customers and suppliers

Merger and acquisition players — especially sellers — are wary of the "material adverse change" clause because although it would seem to be a smart provision that promotes post-sale performance of acquired companies, a MAC claim is hard to prove, and case law on the issue is scarce, say Lewis H. Lazarus and Jason Jowers of Morris James LLP.

SEE PAGE 3

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'Material adverse change' clauses protect against loss of customers and suppliers

By Lewis H. Lazarus, Esq., and Jason Jowers, Esq.
Morris James LLP

Conventional wisdom contends that it is difficult, if not impossible, to succeed on a claim for breach of a "material adverse change" or "material adverse effect" clause in the representations and warranties or closing conditions of a merger or asset purchase agreement.

NO MACS FOUND

As recently as 2008, the Delaware Chancery Court noted that "Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement." *Hexion Specialty Chems. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008). Not all MAC clauses, however, are limited to protecting financial results. MAC clauses may be drafted to protect against any number of changes, including changes in customer and supplier relationships. It is as yet unclear if the courts' past reluctance to find violations of MAC clauses dealing with financial results will carry over to cases involving MAC clauses providing additional protections.

Particularly in the case of companies that have high customer concentration or are dependent on a single supplier, the inclusion of protections against material adverse changes to "customer relationships" or "supplier relationships" could endanger a transaction or expose the seller to significant post-closing liability. The risks are heightened if the seller's company does business with privately held customers or suppliers because a seller may not be aware of problems being felt by that customer or supplier.

Especially during periods of economic uncertainty, buyers and sellers should carefully consider the nature of the MAC clause needed. And if the seller at issue loses a key customer or supplier, counsel for both the seller and buyer should carefully scrutinize the MAC clause, as not all such clauses are created equal.

NO SHORT-TERM BLIPS

Generally, courts will not find a material adverse change for a short-term financial blip.

The two most-often cited MAC cases remain *Hexion* and *In re IBP Inc. Shareholders Litigation*, 789 A.2d 14, 68 (Del. Ch. 2001) (interpreting New York law). They offer detailed explanation of the standard governing a claim of material adverse change based on changed financial results.

significant manner," the *Hexion* court said. "A short-term hiccup in earnings should not suffice; rather ... [an adverse change] should be material when viewed from the longer-term perspective of a reasonable acquirer." *Id.* at 738 (quoting *IBP*, 789 A.2d at 68) (emphasis added).

Furthermore, the *Hexion* decision teaches that the "important consideration ... is whether there has been an adverse change in the target's business that is consequential

As recently as 2008, the Delaware Chancery Court noted that "Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement."

In both cases, the seller represented in a merger agreement that there had been no "material adverse effect" since a particular date. In the *IBP* case, a material adverse effect was "defined as 'any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a material adverse effect' ... 'on the condition (financial or otherwise), business, assets, liabilities or results of operations of [IBP] and [its] subsidiaries taken as whole.'" *IBP*, 789 A.2d at 65. Similarly, in *Hexion*, an MAE was defined as "any occurrence, condition, change, event or effect that is materially adverse to the financial condition, business, or results of operations of the company and its subsidiaries, taken as a whole." *Hexion*, 965 A.2d at 736.

BACKSTOPPING

Courts generally have been reluctant to find that a change in projections or earnings amounts to a material adverse effect.

"That provision [the MAE clause] is best read as a backstop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally

to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months." *Id.* at 738 (emphasis added); see also *IBP*, 789 A.2d at 68 ("[T]he important thing is whether the company has suffered a material adverse effect in its business or results of operations that is consequential to the company's earnings power over a commercially reasonable period, which one would think would be measured in years rather than months. It is odd to think that a strategic buyer would view a short-term blip in earnings as material, so long as the target's earnings-generating potential is not materially affected by that blip or the blip's cause.").

NO LONG-TERM CONSEQUENCES

The *Hexion* court found that first-half 2008 EBITDA that was down 19.9 percent from the same period the prior year and second-half 2007 EBITDA that was 22 percent below projections were not a compelling basis for finding an MAE. *Hexion*, 965 A.2d at 740.

Similarly, in *IBP*, the court found that earnings 64 percent below the comparable period in the prior year were not an MAE

when taking into account the cyclical nature of the company's business. *IBP*, 789 A.2d at 69. In both instances, the buyer failed to prove there was evidence sufficient to indicate a change that would have long-term financial consequences.

This is not to suggest, however, that it is impossible to succeed on an MAE claim for a change in financial condition. For example, when approving a settlement agreement in one case, the Chancery Court noted that it was likely that a 50 percent decline in earnings over two consecutive quarters was strong evidence of a material adverse change on the seller's financial condition since signing the merger agreement. See *Raskin v. Birmingham Steel Corp.*, 1990 WL 193326, at *5 (Del. Ch. 1990); see also *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 557 (Del. Ch. 2001) (denying motion to dismiss MAE claim where loss, if proven, would meet \$6.5 million threshold identified in contract).

With that said, as *Hexion* and *IBP* indicate, the burden of proving a material adverse effect for a change in financial results is a difficult one to meet.

MORE THAN FINANCIALS

MAC clauses may expand beyond financial results to include customer and supplier relationships.

Although it has proved difficult to succeed on a MAC clause breach claim for reduced financial performance, depending on the customer or supplier concentration of the entity being sold, the seller may have more exposure if the MAC clause also protects against material adverse changes to customer relationships or supplier relationships.

Imagine a scenario where a mid-market limited liability company or partnership that does a quarter of its business with a single customer or is reliant on a single supplier agrees to sell its assets to a buyer. A typical MAC representation and warranty might provide, "Since [date], there has not occurred any material adverse change."

Normally, the purchase agreement would then define the term "material adverse change." A typical definition might define it as a "material adverse change in the business, results of operations, assets or financial condition of the seller, as determined from the perspective of a reasonable person in the buyer's position." KENNETH A. ADAMS, A MANUAL

OF STYLE FOR CONTRACT DRAFTING § 7.77 (Am. Bar Ass'n 2005).

However, in the scenario of the mid-market company with high customer concentration, suppose the buyer negotiated the following definition: "A 'material adverse change' is a material adverse change in the business, results of operations, assets, or financial condition, customer relationships, or supplier relationships of the seller as determined from the perspective of a reasonable person in the buyer's position."

The seller may have more exposure if the MAC clause also protects against material adverse changes to customer relationships or supplier relationships.

Cases involving such provisions have begun to appear. See *Transcomp Sys. v. P.C. Scale Inc.*, 2010 WL 3187426, at *1 (C.D. Cal. Aug. 10, 2010) (seller "represented and warranted that since the date of the financial statements there had not been '... any material adverse change in any material customer or or supplier to the business or any material adverse change to the seller's business relationship with any such customers or suppliers'"); *Jesse v. HSFL Acquisition Co. LLC*, 2009 WL 1086474, at *2 (D. Minn. Apr. 22, 2009) (case involving MAC clause providing that "[s]ince the most recent financial statements ... there has been no material adverse effect in the business relationship with any customer or supplier").

Do MAC clauses with the "customer relationships" and "supplier relationships" provisions provide more buyer protection than the more traditional MAC clauses that only protect against changes in "the business, results of operations, assets or financial condition"? Arguably, they do.

DELAWARE'S INTERPRETATION

A court, particularly in Delaware, is unlikely to find that the addition of "customer relationships" and "supplier relationships" is merely surplusage that does not alter the meaning of the definition of a material adverse change.

Normally, "[c]ontractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."

NAMA Holdings LLC v. World Mkt. Ctr. Venture LLC, 948 A.2d 411, 419 (Del. Ch. 2007); see also, e.g., *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'"); *KFC Nat'l Council & Advertising Coop. v. KFC Corp.*, 2011 WL 350415, at *11 (Del. Ch. Jan. 31, 2011) (same); *Majkowski v. Am. Imaging Mgmt. Servs. LLC*, 913 A.2d 572, 588 (Del. Ch. 2006) (explaining that courts "attempt to interpret each word or phrase in a contract

to have an independent meaning so as to avoid rendering contractual language mere surplusage"); *W. Willow-Bay Court LLC v. Robino-Bay Court Plaza LLC*, 2007 WL 3317551, at *11 (Del. Ch. Nov. 2, 2007) ("Delaware courts do prefer to interpret contracts to give effect to each term rather than to construe them in a way that renders some terms repetitive or mere surplusage.").

In other words, it is unlikely that a court would find "customer relationships" and "supplier relationships" synonymous with the financial results of the company.

TWO STANDARDS

It is unlikely that a court would apply the same standard for breach of a MAC clause referring specifically to "customer relationships or supplier relationships" as was articulated in *IBP* and *Hexion* for a more traditional MAC clause. There, interpreting an alleged material adverse change in the "business" or "financial condition," it is understandable that the court focused on whether the change would affect the companies' long-term earning power. The court was called upon to determine what a "material" change on "financial condition" of a business is.

However, although a lost customer or supplier might affect the financial results of the seller, when a MAC clause specifically protecting customer and supplier relationships is used, the buyer is arguably contracting for protection against the predicate change — the change in the customer and supplier relationship in and of itself — that later may lead to a change in financial results because

of the lost or altered customer or supplier relationship.

A court could well find that by bargaining for the “customer relationship” and “supplier relationship” language in the MAC clause, a buyer has an expectation of customer and supplier relationships transitioning with the business over and above protection of long-term financial forecasts. In such an event, the buyer has arguably contracted to protect something of a different character than general financial results.

As such, even if a lost customer relationship does not evince a financial loss threatening the overall earnings potential of the company, as required in *IBP* and *Hexion*, a court could find that the parties have agreed that a material change in customer or supplier relationships, standing alone, is a material adverse change.

Finally, it is important to recognize the relationship between the phrase “material adverse change” and the addition of “customer relationships” in the definition of a material adverse change. The plain language of the agreement, with the addition of “customer relationships” and “supplier relationships,” provides that a MAC “is a material adverse change in the ... customer relationships or supplier relationships of the seller.”

In addition to the risks associated with the inclusion of “customer relationships” and “supplier relationships” in the hypothetical definition of a MAC clause above, the existence, or absence, of other modifying provisions in a MAC clause may give the customer and supplier relationship protections more or less potency.

For example, suppose a buyer purchases an LLC’s assets. However, shortly after closing, the company’s primary customer announces that it is going out of business. The customer had decided prior to the closing of the asset purchase that it would have to close its doors because of its own poor financial performance.

Prior to closing, the customer provides no indications to the seller of any problems, and the customer is a privately held entity with no obligation to report its intentions. The purchaser brings an action against a seller post-closing for breach of the MAC clause seeking damages. Arguably, the customer’s decision to stop doing business, and stop purchasing products or services from the LLC, is a material adverse change under the hypothetical MAC clause set forth above.

So, should the seller’s counsel draw comfort from the seller’s lack of pre-closing knowledge of the change? Although the lack of knowledge makes a fraud claim less likely

Conversely, in the absence of an express-knowledge qualifier in the MAC clause, it is likely “[b]uyers would argue that this was irrelevant, that the issue is not knowledge or fault, but rather who should bear the risk of an ‘inappropriately high’ purchase price.” *Id.* § 11.04[9] n.104. “As a default, a representation must be true at the time it is made to avoid a breach, regardless of who knew whether the representation was true or not.” *Ivize of Milwaukee LLC v. Complex Litig. Support LLC*, 2009 WL 1111179, at *9 (Del. Ch. Apr. 27, 2009).

However, a knowledge qualifier would generally serve to allocate risk to the buyer if the seller is unaware of the facts breaching a representation and warranty. See *DCV Holdings v. ConAgra Inc.*, 2005 WL 698133, at *10 (Del. Super. Ct. Mar. 24, 2005). Therefore, if a MAC clause provides that, “to the knowledge of the sellers, since [date], no material adverse change has occurred,” a seller’s lack of the knowledge of the adverse change will provide the seller an additional protection.

TWO FORMULATIONS

Attorneys defending against or prosecuting a MAC clause claim based on a lost customer or supplier should also examine whether the clause is forward-looking. In other words, breach of the provision is not conditioned on the defendant’s knowing that the clause was false. Compare the following variations of the MAC clause (incorporating the hypothetical definition of “material adverse change” above).

- Classic formulation: “Since [date], there has not occurred any material adverse change.”
- Forward-looking formulation: “Since [date], there has not occurred any material adverse change or any event or circumstance that would reasonably be expected to result in a material adverse change.”

In the above-discussed example of a customer going out of business shortly after closing, the seller has greater protection against a MAC clause claim under the classic formulation because the change, the lost customer relationship, arguably did not occur prior to closing.

However, under the forward-looking formulation, the events that led to the lost customer relationship, the customer’s own

Especially during periods of economic uncertainty,
buyers and sellers should carefully consider the nature
of the MAC clause needed.

Unlike a clause that merely discusses the financial condition of a seller, nothing about the revised clause suggests that a breach is necessarily dependent on financial performance. In this hypothetical clause, financial performance is merely one in a string of triggering factors. A serious dispute with a customer or a customer’s secret intent to shift business from the seller could arguably trigger a breach even if financial results have been unchanged prior to closing. The material change arguably is to the customer relationships alone.

THE KNOWLEDGE QUALIFIER

An expanded MAC clause without a knowledge qualifier poses significant risks for a seller, particularly if it is forward-looking.

to succeed, the seller’s lack of knowledge does not necessarily eliminate a breach-of-contract claim based on the MAC clause.

The issue is whether the applicable MAC clause is modified by a knowledge qualifier (unlike the hypothetical MAC clause). Under the right set of factual circumstances, if there is no knowledge qualifier, a MAC clause could “result in triggering indemnification obligations of the seller for events it neither knew about nor had reason to know about.” LOU R. KLING & EILEEN T. NUGENT, *NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS* § 11.04[9] (Law Journal Seminars Press 2000).

Naturally, a seller would find this problematic because, before the closing, the seller knew of no change and is not responsible for the change.

poor financial performance, would have occurred before closing. Depending on their severity, those changes might “reasonably be expected to result in a material adverse change” to the company’s relationship with the customer in the future. This could expose the seller to post-closing damages.

Courts generally have been reluctant to find that a change in projections or earnings amounts to a material adverse effect.

CONCLUSION

Although sellers can take some comfort in courts’ reluctance to find MAC clause breaches for financial performance, sellers and their counsel should be careful not to exaggerate that reluctance. Litigators prosecuting or defending against a MAC clause claim involving a company that does business with only a few customers or is reliant on a particular supplier should scrutinize the agreement to determine if customer and supplier relationships are protected.

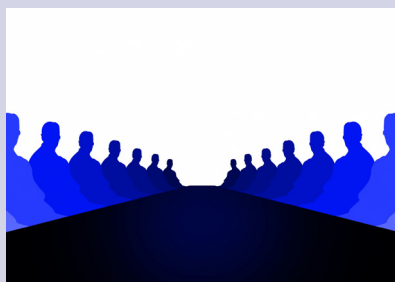
Additionally, it is critically important to understand if the parties allocated risk to the buyer or the seller through the use or absence of a knowledge qualifier. Whether the MAC clause is the classic formulation (analyzing the present and past) or is forward-looking may be the difference between whether a buyer obtains a significant post-closing refund or nothing.

Therefore, clients and their transactional counsel should be attentive to whether a particular MAC clause is in their interests. If a MAC clause claim is brought, clients and their litigation counsel must be cognizant of the varying forms of a MAC clause, as clearly not all such clauses are created equally. **WJ**



Lewis H. Lazarus (left) is a partner at **Morris James LLP** in Wilmington, Del., and a member of its corporate and fiduciary litigation group. His practice is primarily in the Delaware Chancery Court in disputes, often expedited, involving managers and stakeholders of Delaware business organizations. He can be reached at llazarus@morrisjames.com. **Jason C. Jowers**, (right) an associate in the Wilmington office, is a member of its corporate and fiduciary litigation group. His practice focuses on corporate, alternative entity and complex commercial litigation primarily in the Chancery Court and the Delaware Superior Court. He can be reached at jjowers@morrisjames.com.

WESTLAW JOURNAL **CORPORATE OFFICERS & DIRECTORS LIABILITY**



This publication provides coverage of both federal and state litigation and legislation involving the individual liability of corporate officers and directors and corporate governance issues. It summarizes and provides access to the latest pleadings and opinions in this area of the law. Commentary by key litigators provides perspective and insight. It also discusses director and officer liability insurance, fiduciary duty, corporate governance, shareholder suits, and insider trading

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Buffett's rumored successor traded in firm he pitched to boss, suit says

Warren Buffett and his Berkshire Hathaway directors rubber-stamped the \$9 billion acquisition of Lubrizol Corp. even though they knew Buffett's rumored "heir apparent," David Sokol, owned stock in the chemical firm he recommended, a Delaware state court suit charges.

Kirby v. Sokol et al., No. 6392, complaint filed (Del. Ch. Apr. 18, 2011).

In a breach-of-duty suit filed in the Chancery Court on behalf of all Berkshire Hathaway Inc. shareholders, Mason Kirby claims that Sokol violated his fiduciary duty and company policy by buying 96,000 shares of Lubrizol while pitching the deal to Berkshire CEO Buffett.

Shortly after the March 14 announcement of the acquisition, which increased the value of his stock to \$13 million, Sokol announced that he was resigning to spend more time with his family.



REUTERS/Lucas Jackson



REUTERS/B Mathur

Berkshire Hathaway released a scathing report April 27 finding David Sokol (left) violated the company's insider-trading rules and deceived CEO Warren Buffett (right) and the firm about his stake in Lubrizol.

The complaint does not specifically allege that David Sokol engaged in insider trading.

That news, coupled with reports that the Securities and Exchange Commission was considering a formal investigation into Sokol's trades, caused Berkshire Hathaway's stock price to drop, injuring all shareholders, the suit says.

In addition, Sokol's trading and the failure of Berkshire's directors and officers to investigate may lead to a lowered credit rating, an SEC action involving the company and other shareholder suits, Kirby claims.

Berkshire Hathaway has not commented on the litigation.

However, just before press time, the company's audit committee released a scathing report to the board of directors April 27 concerning Sokol's trading of Lubrizol stock and his handling of the acquisition.

The committee found that Sokol violated Berkshire Hathaway's insider-trading rules and deceived Buffett and the firm about his stake in Lubrizol.

The report appears to provide support for charges that Sokol usurped a corporate opportunity that should have belonged to his employer, breached a duty of candor by not revealing his interest in Lubrizol, and violated state and federal insider-trading laws.

Kirby's suit says the law of Delaware, where the Omaha, Neb.-based Berkshire Hathaway is incorporated, bars self-dealing actions like

Sokol's and so does the company's ethics policy, which Sokol signed. However, the complaint does not specifically allege that Sokol engaged in insider trading.

The suit asks the court to order Sokol to disgorge all profits he gained from his trading. Kirby seeks a determination that Buffett and the directors should be held personally liable for any damage the company and its shareholders suffered as a result of their failure to properly supervise the firm. **WJ**

Attorney:

Plaintiff: Carmella Keener, Rosenthal, Monhait & Goddess, Wilmington, Del.

Related Court Document:

Complaint: 2011 WL 1471274

See Document Section A (P. 21) for the complaint.

Chandler

CONTINUED FROM PAGE 1

Chandler, who joined the Chancery Court in 1989 after four years as a state Superior Court judge, was appointed to a third 10-year term in 2009.

His replacement will be a major appointment for newly elected Gov. Jack Markell.

A spokesman at the governor's office said Chandler was a "one-of-a-kind judge that will be difficult to replace."

Chandler had been with the Wilmington-based law firm Morris, Nichols, Arsht & Tunnell before serving as the legal counsel to former Gov. Pete duPont.

COURT ENVY

Corporate law experts have ranked Chandler among the top business court judges.

"Under Chancellor Chandler's leadership, the reputation of the Delaware Court of Chancery has excelled to a height that makes it the envy of court systems around the country and the world," said **Francis G.X. Pileggi**, a partner of **Fox Rothschild LLP** in Wilmington.

Pileggi edits a popular website on Delaware corporate law, <http://www.delawarelitigation.com>.

"He has implemented policies that have ... [made the court] an efficient, high-tech, well-oiled machine that dispenses justice with special expertise, speed and sensitivity," Pileggi said. "He has made it the standard by which other business courts are measured."

'EROSION' LAMENTED

Two-thirds of the nation's Fortune 500 companies incorporate in Delaware. The state is known for its corporate law that balances the interests of management and shareholders and for its expert business court judges, who quickly and consistently resolve business and corporate governance disputes.

However, Chandler recently expressed concern that key Delaware case law that provides that balance in challenged mergers has been "eroded" by recent state Supreme Court decisions that have tipped the playing field in favor of corporate directors.

At a recent seminar on corporate governance disputes, he pointed to the outcome of Air Products & Chemicals' futile yearlong struggle to acquire rival industrial gas company Airgas Inc. as an example of that "erosion."

In that high-profile case, he reluctantly decided that Airgas could continue to use its takeover defenses to keep Air Products at bay even though the only threat to justify those

defenses was Air Products' failure to meet the price the Airgas directors had set. *Air Prods. & Chems. v. Airgas Inc. et al.*, No. 5249; *In re Airgas Inc. S'holder Litig.*, No. 5256, 2011 WL 519735 (Del. Ch. Feb. 15, 2011).

Chandler said recent Delaware Supreme Court rulings had "eroded" the balance between the power of management and shareholders by allowing directors to use takeover defenses even when there was no real threat to the company.

However, he said the precedent set by those decisions left him no choice but to allow Airgas to continue to use two potent anti-takeover defenses even though "the real-world combination [of those defenses] was absolutely lethal" to the bid.

Air Products gave up its hard-fought quest after that ruling.

Chandler, 60, is a resident of rural Sussex County in the southern end of Delaware.

In a statement Markell predicted that Chandler's "corporate law decisions will be studied in law schools and corporate boardrooms for decades to come.

"But here in Delaware, what we will remember about the chancellor is how he treated everyone, whether a high-priced lawyer in his courtroom or a stranger at the coffee shop, with that same Delaware courtesy and respect," the governor added. **WJ**

WESTLAW JOURNAL **BANKRUPTCY**



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The Delaware Supreme Court: (seated left to right) Justice Randy J. Holland, Chief Justice Myron T. Steele and Justice Carolyn Berger and (standing left to right) Justice Henry duPont Ridgely and Justice Jack B. Jacobs

SETTLEMENT ISSUES

Delaware high court says split-up of \$1.5 billion hedge fund was fair

In a ruling that resolves a seven-year feud between two founders of the once-mighty Catequil Asset Management hedge fund, Delaware's highest court has affirmed a decision that the fund's \$1.5 billion in assets were fairly divided after they parted ways.

In re Catequil Management Entities Litigation, No. 642-2010, 2011 WL 1434675 (Del. Apr. 14, 2011).

The Supreme Court endorsed Vice Chancellor Leo Strine's reasons for dismissing claims that one ex-partner was cheating the other out of his just due under a 2004 agreement in which they tried to resolve their dispute over Catequil's remaining assets.

Former partners Robert Ellis and Paul Touradji had agreed to end the very successful Catequil fund in 2004 after a falling-out over the division of profits and managerial control.

The fund, named after the Inca god of thunder and lightning, was based in New York but incorporated in Delaware, where

the partners exchanged lawsuits that were eventually consolidated into this action.

Ellis had claimed that Touradji failed to honor their agreement to split the profits equally and had usurped control and "looted" Catequil's assets.

Touradji filed an action accusing Ellis of breaching his fiduciary duty to Catequil Management Entities Inc., the fund's parent.

Ellis filed a motion in this consolidated action to enforce the 2004 agreement in the Chancery Court.

In a ruling from the bench July 12, 2010, Vice Chancellor Strine found that Ellis was not cheating Touradji out of his just due under the pact and had not breached that agreement, as Touradji claimed.

Vice Chancellor Strine ordered Touradji to pay more than \$200,000 in attorney fees Ellis incurred litigating this action.

In Touradji's appeal to the state high court, he claimed that Vice Chancellor Strine improperly granted Ellis' motion to enforce the agreement and awarded attorney fees without holding an evidentiary hearing.

Former partners Robert Ellis and Paul Touradji agreed to end the very successful Catequil fund in 2004 after a falling-out over the division of profits and managerial control.

The ruling effectively denied Touradji's claims against Ellis without a record of evidence and testimony on which to base that decision, Touradji argued.

Touradji said the Chancery Court also erred when it rejected his claim that Ellis had no right to insist on specific performance of the settlement agreement because he himself had engaged in bad-faith conduct.

Ellis countered that there is no provision in the settlement agreement that requires an allocation of the Catequil assets that is different from the one that Touradji challenges.

Ellis argued that what Touradji is really disputing is the approach and methods that Ellis was using.

One day after hearing oral argument in the case, a state Supreme Court panel issued a two-paragraph order that affirmed the ruling in favor of Ellis for the reasons cited by the Chancery Court.

Writing for Justices Carolyn Berger and Jack Jacobs, Justice Randy Holland also affirmed Vice Chancellor Strine's award of attorney fees. **WJ**

Attorneys:

Appellant: Gary Traynor, Prickett, Jones & Elliott, Wilmington, Del.

Appellee: P. Clarkson Collins Jr., Morris James LLP, Wilmington

Related Court Document:

Order: 2011 WL 1434675



REUTERS/Fabrizio Bensch

On the same day it announced merger, medical equipment maker Celera "shocked the market" with financial filings that "expose the fact that Celera's management engaged in a wide-ranging accounting fraud over the past several years," the suit says.

SETTLEMENT ISSUES

Celera investors get info and time but no more money in Quest merger-suit pact

A half dozen shareholder suits filed in Delaware and California challenging Quest Diagnostics' \$344 million offer for medical equipment maker Celera Corp. will be settled in exchange for more information about the deal and time for competing suitors to emerge.

In re Celera Corp. Shareholder Litigation, No. 6304, memorandum of understanding filed (Del. Ch. Apr. 18, 2011).

A memorandum of understanding outlining the terms of the tentative settlement, filed in the Delaware Chancery Court, needs Vice Chancellor Donald Parsons' approval after Celera shareholders have the opportunity to examine and object to the pact.

The settlement would resolve three shareholder suits in the Chancery Court and three more in the California's Alameda County Superior Court, with no admission of wrongdoing from Celera's directors and officers and no increase in the \$8 per share Quest will pay for Celera.

Shareholders filed parallel suits in California, where Celera is based, and Delaware, where it is incorporated, contesting the terms and the negotiation method used to reach the merger agreement announced March 17.

In one of the Delaware suits a pension fund charges that on the same day it announced the merger, Celera "shocked the market" with financial filings that "expose the fact

that Celera's management engaged in a wide-ranging accounting fraud over the past several years."

The suit by the New Orleans Employees' Retirement System said the earnings restatements Celera made are "so expansive and damning that had they been disclosed independent of a merger announcement that propped up the stock price," they would have exposed the senior management and board to liability for violating the federal securities laws.

The officers and directors who negotiated the sale to Quest thought only of their own interests and spent all their "negotiating capital" on securing their jobs, severance packages and indemnification, the pension fund complains.

The settlement calls for a lower termination fee a successful competing buyer would have to pay if Quest's offer is rejected. In addition it provides additional disclosures and time to investors who are deciding whether to sell to Quest.

The pact extends Quest's tender offer to May 2. It had been set to expire April 25.

In addition, the settlement calls for a modification of the merger agreement that allows Celera to distribute information to other prospective bidders

In a press release, Celera said there are still three suits over the merger that are not covered by this settlement: one in the Alameda County Superior Court and two in the U.S. District Court for the Northern District of California.

Celera said the company and the other named defendants "continue to believe that each of the aforementioned lawsuits is without merit and that they have valid defenses to all claims made by the applicable plaintiffs."

Jerome Davis, chairman of the board of the New Orleans Employees' Retirement System, said in a statement, "We uncovered what we believe is a bad corporate governance practice relating to standstill provisions, that is unfortunately more widespread than just this instance." [WJ](#)

The settlement calls for a lower termination fee a successful competing buyer would have to pay if Quest's offer is rejected.

Attorneys:

Plaintiffs: Stuart Grant, Grant & Eisenhofer, Wilmington, Del.; Mark Lebovitch, Bernstein Litowitz Berger & Grossmann, New York

Defendant (Celera): Kevin Abrams, Abrams & Bayliss, Wilmington

Defendant (Quest): Gregory Williams, Richards, Layton & Finger, Wilmington

Managed care firm cut off defense funds in criminal case, ex-exec says

An ousted WellCare Health Plans executive has told the Delaware Chancery Court he can't get a lawyer to defend him against criminal Medicaid fraud charges because the managed care services provider reneged on its promise to pay his legal bills.

Kale v. WellCare Health Plans Inc., No. 6393, complaint filed (Del. Ch. May 2, 2011).

William Kale, who served as a vice president of several WellCare subsidiaries, claims the firm originally stood by him and advanced him the money for his attorney bills in a government investigation of whistle-blowers' claims that WellCare officials cheated Medicaid out of as much as \$600 million.

Then the company continued to pay his legal bills during an internal investigation, shareholder suits and the government's civil Medicare fraud charges against the firm, which led to a 2009 settlement costing WellCare \$80 million in restitution and forfeitures, according to Kale's lawsuit.

William Kale says that less than two months after his March criminal indictment, WellCare denied that it was obligated to advance his criminal defense funds.

But Kale says that when he and four other ex-execs were indicted in March on criminal charges for their part in that alleged fraud, WellCare refused to advance funds for those legal bills and, as a result, he could not retain a lawyer to represent him in federal court in Florida.

Even though based in Tampa, Fla., WellCare is incorporated in Delaware and is required to pay the legal bills its officers and directors run up in any investigation or litigation stemming from their service to the company.

In addition to that indemnification guarantee, Delaware-chartered companies agree to pay those bills as they come in rather than at the end of the litigation.

That advancement promise is good until the officer or director is finally convicted of dishonest or disloyal conduct.



However, Kale says, less than two months after his criminal indictment, WellCare denied it was obligated to advance his criminal defense funds.

No one at WellCare immediately responded to a request for comment on the lawsuit.

The criminal case alleges the firm's former CEO, CFO and general counsel conspired with Kale and another vice president to funnel improperly gained Medicaid profits through two of its HMOs and hide them by juggling its books. *United States v. Faha et al.*, No. 11-cr-00115, indictment filed (M.D. Fla. Mar. 2, 2011).

The company resolved charges over its role in that alleged wrongdoing in May 2009 by agreeing to a deferred prosecution and paying \$40 million in restitution and another \$40 million in forfeitures.

Kale claims that WellCare's board of directors did not give any explanation for its refusal to advance his expenses in the criminal action.

Kale seeks a declaratory judgment that WellCare is not entitled to terminate his advancement in the criminal case.

He also asks the court to award him the cost of bringing this action to force the company to pay up. [WJ](#)

Attorneys:

Plaintiff: Samuel Herzel and Meghan A. Adams, Proctor Heyman LLP, Wilmington, Del.

Related Court Document:

Complaint: 2011 WL 1526860

See Document Section B (P. 31) for the complaint.

Abercrombie charges shouldn't have been shelved, 6th Circuit says

A federal appeals court in Cincinnati has revived shareholder securities fraud suits against Abercrombie & Fitch Co. after finding that under Delaware law, the special litigation committee the clothing retailer appointed to investigate the charges was not independent.

Booth Family Trust et al. v. Jeffries et al., No. 09-3443, 2011 WL 1237583 (6th Cir. Apr. 5, 2011).

Ruling on an issue of first impression, a 2-1 majority of the 6th U.S. Circuit Court of Appeals found that when one member of the two-director committee recused himself from deciding whether Abercrombie's CEO took part in the alleged wrongdoing, he — and the committee — could no longer objectively review any of the charges.

The panel reversed an Ohio federal judge's dismissal of charges that Abercrombie's top officers issued a series of misleading statements about the success of the company's business plan and falsely inflated the stock price in 2005.

The stock price soared but fell just as quickly, damaging the shareholders, when Abercrombie admitted it had given investors an overly rosy picture of its fiscal health, according to several shareholder suits.

However, the plaintiffs said, Abercrombie's top officers, using inside information, had already sold large blocks of their stock before the bad news hit the market.

After the shareholders sued on behalf of the company, Abercrombie invoked its right as a Delaware-chartered corporation to appoint a special litigation committee from the board of directors that would look into the merit of the charges.

Under Delaware law, if the committee is independent, objective and thorough, the court gives considerable weight to its recommendation as to whether the charges it investigated have merit or should be dismissed.

The U.S. District Court for the Southern District of Ohio found that the two-director committee that Abercrombie appointed was independent and objective even though one of the members, Allan Tuttle, had recused himself from judging the actions of the CEO because the two were personal friends.

The District Court granted the company's motion to dismiss based on the committee's recommendation.

On appeal the 6th Circuit found "serious questions" as to the committee's independence and reversed the dismissal.

Writing for the majority, Judge Boyce Martin Jr. said he could find no previous case in Delaware or elsewhere involving the effect of the disqualification of one member of a two-director special litigation committee.

The 6th Circuit found "serious questions" as to the committee's independence and reversed the dismissal.

Judge Martin pointed out that the burden of proof is on the company to show that the committee was independent. Therefore, the plaintiffs did not have to show that the members "are not persons of good faith," but only that "they were not situated to act with the required degree of impartiality," the judge wrote.

Tuttle's decision to recuse himself from considering the allegations against the CEO in effect disabled him from reviewing the charges in general, because of the CEO's central role, Judge Martin said. That meant the committee itself was disabled because it was designed to operate with two people, he wrote.



REUTERS/Fred Prouser

Tuttle could not separate out the allegations against the CEO and "essentially launched a signal flare that he was not independent," Judge Martin said.

"This is one of those rare situations where Abercrombie had every opportunity to create an independent special litigation committee but nonetheless failed to do so," he wrote.

In a dissenting opinion, Judge Richard Griffin said the majority relied almost entirely on

Tuttle's partial recusal in finding that Tuttle and the committee lacked independence.

Had Tuttle chosen not to recuse himself regarding the CEO, there would have been no grounds to doubt the committee's independence, Judge Griffin pointed out in recommending that the District Court's dismissal order be upheld. **WJ**

Attorneys:

Appellants: Jacob Goldberg, Faruqi & Faruqi, Huntington Valley, Pa.

Appellees: Philip Brown, Vorys, Sater, Seymour & Pease, Columbus, Ohio

Related Court Document:

Opinion: 2011 WL 1237583

Merrill Lynch, BofA win dismissal of investor suits under Delaware law

A federal judge in New York has applied Delaware law and tossed two shareholder suits alleging that former executives of Merrill Lynch, prior to its merger with Bank of America, hurt the company by piling up massive debt backed by subprime mortgages.

In re Merrill Lynch & Co. Securities Derivative & ERISA Litigation, Nos. 07-9696 and 09-8259, 2011 WL 1134708 (S.D.N.Y. Mar. 28, 2011).

U.S. District Judge Jed S. Rakoff of the Southern District of New York said the plaintiffs failed to satisfy Delaware's threshold demand requirement on the BofA board of directors.

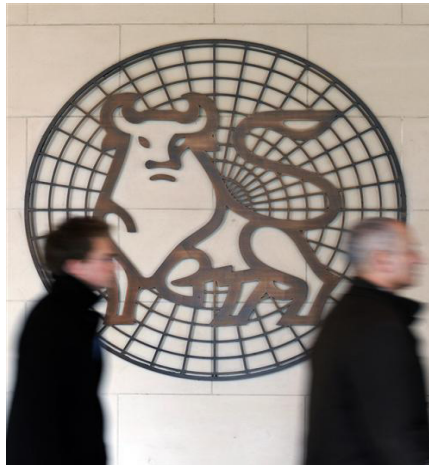
Merrill Lynch, one of several venerable Wall Street institutions that foundered in the financial crisis, merged with BofA two years ago.

The lawsuit started as a consolidation of various shareholder derivative actions against Merrill officers and directors in 2007.

In a derivative suit, a shareholder's right to sue on behalf of a company derives from the company's primary right to sue directors and officers if they fail to act in its interests.

A shareholder may sue on behalf of the company if the board of directors refuses to do so or if it is futile for the shareholder to demand a suit because the directors would in effect be agreeing to sue themselves.

Judge Rakoff dismissed the suits shortly after the January 2009 merger of BofA and Merrill. *In re Merrill Lynch & Co. Sec., Derivative & ERISA Litig.*, 597 F. Supp. 2d 427 (S.D.N.Y. 2009).



REUTERS/Toby Melville

Merrill Lynch, one of several venerable Wall Street institutions that foundered in the financial crisis, merged with BofA two years ago.

BofA shareholders Miriam Loveman, of Maryland, and N.A. Lambrecht, of Florida, revived the suits by filing separate "double derivative" complaints on behalf of BofA against the same former Merrill executives.

Loveman and Lambrecht are former Merrill Lynch shareholders who ended up with BofA shares after the merger.

A double-derivative suit by definition involves the boards of two companies. The shareholders alleged that BofA's directors breached their fiduciary duty by not suing the

Addressing Loveman's complaint first, the judge said she had never asked the BofA board to sue the pre-merger Merrill officers and directors.

Judge Rakoff rejected Loveman's contention that any such demand would have been futile.

Loveman claimed that the BofA directors could not make a disinterested assessment of a demand because they purportedly faced a likelihood of liability for events surrounding the merger.



REUTERS/Fred Prouser

Judge Rakoff said most of Loveman's complaint related to pre-merger activity and that she failed to explain why the BofA board would be incapable of performing a disinterested assessment of a demand to sue the Merrill defendants for their pre-merger conduct.

In Lambrecht's case, she did make demands of the BofA board to sue but said the board wrongfully refused her requests.

Judge Rakoff said a board's decision to reject a demand is entitled to the benefit of the business judgment rule.

The rule presumes that a board makes a decision on an informed basis and in good faith that the action taken was in the best interests of the company.

Lambrecht's contention that the BofA board acted in bad faith and undertook no investigation of her claims is conclusory and insufficient to overcome the business judgment rule, the judge said. [WJ](#)

Related Court Document:
Opinion: 2011 WL 1134708

One plaintiff failed to explain why the BofA board would be incapable of performing a disinterested assessment of a demand to sue the Merrill Lynch directors for their pre-merger conduct, the judge said.

Applying Delaware corporate law, Judge Rakoff ruled the shareholder plaintiffs relinquished their standing by accepting BofA shares for their Merrill shares as part of the merger deal.

former Merrill Lynch directors for harming Merrill.

The defendants moved to dismiss the revived complaints, and Judge Rakoff heard argument on the motions Dec. 14.



REUTERS/Robert Galbraith

SETTLEMENT ISSUES

Washington Mutual asks court to OK settlement of loan fee class action

Bankrupt Washington Mutual Inc. has asked a federal judge to approve a \$13 million deal to settle what it calls a meritless nationwide class-action lawsuit over allegedly improper loan fees.

In re Washington Mutual Inc. et al., No. 08-12229, motion to approve settlement filed (Bankr. D. Del. Mar. 31, 2011).

The savings and loan holding company says in papers filed with the U.S. Bankruptcy Court for the District of Delaware that the settlement allows it to avoid the inherent risks and costs of litigation.

Washington Mutual Inc. operated Washington Mutual Bank, commonly known as WaMu. WaMu was once the nation's largest savings and loan until it collapsed in 2008 under the weight of the plummeting subprime mortgage market.

The federal Office of Thrift Supervision seized WaMu Sept. 25, 2008, and the Federal Deposit Insurance Corp., acting as WaMu's receiver, immediately sold the banking operation to JPMorgan Chase.

The next day, Washington Mutual and its subsidiary WMI Investment Corp. filed voluntary Chapter 11 cases in Delaware.

At the time, a lawsuit was pending in federal court in New York that alleged Washington Mutual directly, and indirectly through

certain subsidiaries, had charged improper mortgage and home equity loan fees. *Cassese et al. v. Wash. Mut.*, No. 05-2724 (E.D.N.Y.)

Among the fees complained about were "fax fees," "payoff statement fees" and "recording fees" allegedly charged to borrowers when they paid off the loans.

The representative plaintiffs subsequently filed individual and class proofs of claim.

The Bankruptcy Court lifted the automatic stay in September 2009 to allow the litigation to proceed. Later that month the New York federal court certified a class against Washington Mutual.

The parties eventually agreed to settle the litigation in February for \$13 million.

A hearing on Washington Mutual's motion for approval of the settlement is scheduled for May 2. [WJ](#)

Attorneys:

Debtors: Mark D. Collins, Chun I. Jang and Travis A. McRoberts, Richards Layton & Finger, Wilmington, Del.; Brian S. Rosen, Weil Gotshal & Manges, New York

BANKRUPTCY ISSUES/ ASSETS SALES

UnXis completes purchase of bankrupt SCO Group

UnXis Inc. has finalized its purchase of the assets of bankrupt SCO Group Inc., following Novell Inc.'s apparent decision not to appeal an order approving the sale.

In re SCO Group Inc., No. 07-11337, assets sale completed (Bankr. D. Del. Apr. 11, 2011).

UnXis' announcement ends nearly four years of Chapter 11 bankruptcy proceedings for the once high-flying Unix vendor.

The deal became final after creditor and one-time business partner Novell Inc. did not appeal U.S. Bankruptcy Judge Kevin Gross' March 7 order approving the company's sale. Judge Gross, of the U.S. Bankruptcy Court for the District of Delaware, had given Novell 14 days to appeal his order.

"With the purchase of these valuable assets complete, we can now focus 100 percent of our attention and energies on bringing state-of-the-art technology capabilities to the Unix platform, improving customer service and support, and capitalizing on the robust and secure SCO UNIX operating system for today's cloud-based systems," UnXis CEO Richard A. Bolandz, said in a statement.

SALE TO UNXIS

UnXis' submitted a winning bid of \$600,000 for SCO's assets at an auction held Jan. 19. The only other bidder was an unidentified person who offered just \$18 in cash.

In approving the sale, Judge Gross allowed SCO to reject a 1995 software license agreement it had with Novell, meaning a \$3 million judgment SCO owed Novell stemming from that agreement will go unpaid.

The SCO products will also be allowed to continue the use of Novell's proprietary Unix code without further compensation to Novell.

NOVELL AND SCO

In the early 1990s, SCO licensed Unix from Novell in exchange for ongoing licensing payments. SCO later claimed that it acquired the rights to Unix outright from Novell under this agreement.

Novell disputed SCO's Unix ownership claim and sought a court ruling to that effect. It also demanded \$26 million in licensing payments it claims SCO wrongfully withheld.

In 2007 a federal judge in Utah ruled that while SCO received a license to incorporate Unix code into its UnixWare software under a 1995 asset purchase agreement, Novell retained the actual ownership rights.

The judge ordered SCO to pay Novell \$3 million in back licensing payments he said the company owed pursuant to the 1995 agreement.

SCO filed for Chapter 11 bankruptcy in the District of Delaware shortly after losing to Novell.

LINUX-RELATED LITIGATION

Since 2003, SCO has also alleged the open-source Linux operating system contains proprietary Unix code it claimed to own. Based on this claim, SCO filed several headline-grabbing lawsuits against IBM and other industry heavyweights seeking billions in licensing fees for Linux products they developed.

THE SALE MOTION

During the bankruptcy proceedings, Novell objected to the assets sale, claiming SCO had to fully satisfy its \$3 million obligation to Novell in order to continue the use Novell's software in the products. It further said SCO cannot transfer its licensing rights under the 1995 agreement to UnXis without Novell's consent.

Judge Gross rejected all of Novell's claims, finding SCO had the right to reject the agreement because the agreement was not an executory contract under which Novell had any remaining obligations to fulfill.

The judge also accepted SCO's argument that, since the agreement had been transferred between SCO and various predecessor corporate entities, SCO had the right to transfer it to UnXis. **WJ**

BANKRUPTCY ISSUES/ADVERSARY ACTIONS

Baker & McKenzie sued over stock fraud scam that doomed company

The law firm of Baker & McKenzie has been sued for its alleged role in devising a stock fraud scheme that led to the financial collapse of chemical company Industrial Enterprises of America.

In re Pitt Penn Holding Co. Inc., No. 09-11475; Industrial Enterprises of America Inc. v. Baker & McKenzie et al., Adv. No. 11-51767, complaint filed (Bankr. D. Del. Apr. 11, 2011).

Pittsburgh-based IEAM, an affiliate of Pitt Penn Holding Co., claims that the law firm and partner Martin Weisberg participated in the "looting of IEAM — a looting that could not have occurred without defendants' legal expertise," according to the complaint.

Pitt Penn and its affiliates, including IEAM, filed for Chapter 11 protection in May 2009 in the U.S. Bankruptcy Court for the District of Delaware. IEAM filed its lawsuit as an adversary action in the Bankruptcy Court.

IEAM emphasizes throughout its complaint that Weisberg has been charged several times for conspiracy to defraud investors, including a 57-count criminal indictment for his alleged role in the looting of IEAM.

"IEAM had the right not to have criminals for its attorneys," the complaint says.

IEAM says the fraud caused the company to lose \$150 million.

According to the complaint, Baker & McKenzie took on Weisberg as a partner in

2005, primarily because of his association with IEAM and its then-CEO John Mazzuto.

"The substantial fees generated by Weisberg's clients, IEAM included, made him a worthwhile risk in Baker's eyes," the complaint says.

The stock scheme that allegedly caused the downfall of IEAM was created in 2004 and provided for the issuance of restricted IEAM shares to employees, outside directors and consultants, the complaint says.

The documents drafted by Baker & McKenzie and filed with the Securities and Exchange Commission failed to reveal the business and personal relationship between Mazzuto and Weisberg or that Mazzuto had been in personal bankruptcy since 2002, according to the suit.

"Disclosure of these material facts would have halted the fraud in its tracks," IEAM says.

The documents drafted by the law firm were designed to dupe the investing public and regulators into thinking IEAM was in better financial shape than it was, the complaint says.

Holding the Deutsche defendants liable for negligent tax advice requires that:

- They gave tax advice in the course of business or in a deal in which they had a pecuniary interest.
- They gave advice for the plaintiff's guidance in his business transactions.
- The advice was false.
- They failed to exercise reasonable care in obtaining tax advice or communicating it to the plaintiff.
- The plaintiff justifiably relied on the advice.
- The plaintiff suffered a pecuniary loss as a result.

Under the scheme, the beneficiaries of the stock plan funneled the proceeds back into IEAM in order to prop up its stock price, the company alleges.

According to the complaint, Baker was aware of the improprieties involved in the stock plan and participated by, among other things, using the plan to settle several claims in litigation.

The law firm also “looked the other way” while helping IEAM’s officers loot the company and

kept important information from the SEC and Nasdaq when they inquired about the stock plan, the complaint says.

Over a three-year period, Baker received \$1.7 million in fees for such activities as reviewing false SEC and Nasdaq filings, creating an illegal settlement with a former CEO and suppressing disclosure of Mazzuto’s bankruptcy, the suit says.

By the time IEAM filed for bankruptcy in 2009 shareholders had lost \$450 million, the complaint says.

The complaint includes claims for fraud, civil conspiracy, unjust enrichment, professional malpractice, and aiding and abetting breach of fiduciary duties.

IEAM is asking the court to award compensatory and consequential damages, punitive damages, and restitution. [WJ](#)

Attorneys:

Plaintiff: Christopher Loizides, Wilmington, Del.; Steven Thomas, Thomas Alexander & Forrester, Venice, Calif.

Related Court Document:

Complaint: 2011 WL 1430235



President Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act July 21, 2010.

REUTERS/Jim Young

SEC RULES

New SEC rule requires independent compensation committees

A rule proposed by the Securities and Exchange Commission as part of Congress’ Wall Street reform requires public corporations to have a compensation committee with a majority of independent directors if the company is listed on national stock exchanges.

The proposed rule, publicized April 6, directs all national stock exchanges to adopt standards that require listed member companies to have compensation committees with a majority of directors that are not company employees, past employees or directors who receive

money from the company other than for their services on the board.

Public comment on the proposed rule ends April 29.

The proposed rule is one of a series of amendments to the Securities Exchange

Act promulgated by the SEC to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Congress enacted Dodd-Frank in 2010 to prevent a repeat of the 2008 fiscal meltdown and to make corporations more transparent and accountable. Dodd-Frank’s implementation relied heavily on federal agencies such as the SEC to promulgate rules to tighten regulation where needed.

The proposed rule is one of a series of amendments to the Securities Exchange Act promulgated by the SEC to implement provisions of the Dodd-Frank Act.

The rule would direct national stock exchanges and national securities associations to prohibit the listing of any equity security from any company that does not comply with the independent-director requirement.

The proposed rule comes in response to a national outcry by shareholder activists over board-of-director approvals of exorbitant compensation packages for top executives of companies with revenues that did not justify lavish pay, stock options and other benefits.

Many of those boards allegedly were dominated by directors who were officers or business associates of the company and who rubber-stamped wasteful compensation.

The same provisions of Dodd Frank require the SEC to adopt new disclosure rules concerning a board of director’s use of compensation consultants and any conflicts of interest. [WJ](#)

CHANCERY COURT SHORTS

MERCK GETTING PHARMA FIRM TOO CHEAPLY, SUIT SAYS

Pradeep Bheda's shareholder class-action complaint charges that directors of Inspire Pharmaceuticals disloyally agreed to sell the company to Merck & Co. for the grossly inadequate price of \$5 per share. The plaintiff says the directors compounded their breach of fiduciary duty by agreeing to lock up the proposed transaction with deal-protection provisions, including a strict no-shop clause and a \$17 million termination fee. Bheda seeks to enjoin the deal and to force the defendants to account for all profits and special benefits they gained from the transaction. The suit names Adrian Adams, Kenneth Lee, Rip Frey, Richard Kent, Alan Homer, Nancy Hutson Jonathan Leff and George Abercrombie as defendants.

Bheda v. Abercrombie et al., No. 6382, complaint filed (Del. Ch. Apr. 15, 2011).

UNION CHALLENGES DUCOMMUN BID FOR LABARGE

The Insulators and Asbestos Workers Local 14 has filed a class-action suit against the directors of aerospace-focused electronics manufacturer LaBarge Inc. for allegedly disloyally agreeing to a merger with aircraft parts maker Ducommun Inc. for the unfair price of \$19.25 per share. The directors made their breach of duty worse by agreeing to deal-protection provisions that will discourage any prospective competing bidder, the shareholder suit says. The plaintiff seeks an injunction halting the transaction and an order that the defendants must account for all damages suffered caused by their wrongs. The suit names Craig LaBarge, Robert Clark, John Helmkamp Jr., Lawrence LeGrand, Thomas Corcoran and Jack Thomas Jr. as defendants.

Insulators & Asbestos Workers Local 14 v. LaBarge, No. 6384, complaint filed (Del. Ch. Apr. 15, 2011).

EPICOR BOARD TOOK 'OPPORTUNISTIC' OFFER, SUIT SAYS

An Epicor Software Corp. shareholder has filed a class-action complaint claiming the directors breached their duty by agreeing to an "opportunistic" \$976 million merger offer from Apax Partners L.P. The \$12.50-per-share tender offer will be followed by a freeze-out merger for the remaining shares, the suit says. The plaintiff seeks an injunction against the transaction and an order awarding attorney fees. The suit names George Klaus, Robert Smith, John Dillon, Michael Kelly, Michael Hackworth, Richard Pickup and Doug Hajjar as defendants.

Field Family Trust v. Epicor Software Corp., No. 6364, complaint filed (Del. Ch. Apr. 12, 2011).

CHANCERY COURT CASES FILED

	CAPTION	CASE NO.	NATURE OF ACTION	DATE	ATTORNEY
1.	Carrelton v. Solar Power	6375	Books & records	April 13, 2011	William LaMotte III
2.	Dougherty v. Inspire Pharm.	6378	Breach of duty	April 14, 2011	Ryan Ernst
3.	Allen v. Vanguard	6379	Breach of duty	April 14, 2011	Joseph Rosenthal
4.	Aiyub v. Abercrombie	6381	Breach of duty	April 15, 2011	Seth Rigrodsky
5.	Bheda v. Abercrombie	6382	Breach of duty	April 15, 2011	Seth Rigrodsky
6.	IAWL v. LaBarge	6384	Breach of duty	April 15, 2011	Norman Monhait
7.	Pittman v. Clark	6387	Breach of duty	April 15, 2011	Michael Hanrahan
8.	Nannetti v. Balogna	6389	Breach of duty	April 18, 2011	Blake Bennett
9.	Ivers v. K-Sea Transport	6391	Breach of duty	April 18, 2011	Joseph Rosenthal
10.	Kirby v. Sokol	6392	Breach of duty	April 19, 2011	Carmella Keener
11.	Kale v. WellCare	6393	Advancement	April 19, 2011	Samuel Hirzel
12.	Berlinberg v. Bronco	6398	Breach of duty	April 20, 2011	Carmella Keener
13.	Jupiter v. Medi-Globe	6400	Books & records	April 20, 2011	Henry Gallagher
14.	Chan v. Inspire Pharm.	6401	Breach of duty	April 21, 2011	James Strum
15.	Valenti v. Castagna	6405	Breach of duty	April 21, 2011	William O'Day
16.	Jamal v. Tu	6408	Breach of duty	April 22, 2011	Blake Bennett
17.	Hull v. Klaus	6410	Breach of duty	April 22, 2011	Blake Bennett
18.	Klapmeir v. Cirrus Indus.	6411	Books & records	April 22, 2011	Blake Bennett
19.	Reifschneider v. Amphire	6413	Breach of duty	April 25, 2011	P. Clarkson Collins Jr.
20.	Musto v. China Sec.	6418	Breach of duty	April 26, 2011	John Work
21.	Dass v. Bronco	6419	Breach of duty	April 26, 2011	Seth Rigrodsky
22.	Cho v. Chang	6420	Breach of duty	April 26, 2011	Seth Rigrodsky

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